SUPREME COURT, U. S.

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In the

Supreme Court of the United States

OCTOBER TERM, 1966

WILLIAM C. SEIFERTH and WILLIAM H. SEIFERTH, a minor, by WILLIAM C. SEIFERTH, his father and next friend,

Petitioner,

vs.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, a corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above entitled case on October 11, 1966, petition for rehearing of which was denied on November 18, 1966.

CITATIONS TO OPINIONS BELOW

The memorandum opinion of the District Court affirming the jury verdict is unreported and is printed in Deft. App. 156-165. The opinion of the Court of Appeals, printed in Appendix B hereto, *infra,* p. 2a dissenting opinion p. 10a, is reported in 368 F2d 153.

JURISDICTION

The judgment of the Court of Appeals was entered on Oct. 11, 1966 R. 45. Rehearing was denied on Nov. 18, 1966 R. 46. The jurisdiction of this Court is invoked under 28 USC, Section 1254 (1).

QUESTION PRESENTED

When a jury has decided that the minor Petitioner who was invited by railroad employees to board a freight train was a licensee in the train of the Respondent and that the Respondent owed him the duty of not harming him through any active negligence, may the Court of Appeals make a redetermination of the facts and set aside the jury's verdict?

STATEMENT OF THE CASE

Petitioner, a 16 year old boy, with another lad, on July 6, 1963, hitch hiked from Hinsdale, Illinois to St. Louis, Missouri. They were looking for a summer job and Petitioner's companion persuaded him to start for Texas in search of work on a ranch. They spent the night in an empty box car on the Illinois side of the Mississippi River near East St. Louis, and in the morning they entered the unfenced yard of the Respondent for the purpose of boarding a freight train to take them on their way. The boys got in an empty box car but were told by a switchman that they were in an inbound train and they should "see the man over by the shack". (Resp. App. 21, Pet. App. 22). There they came in contact with one of Respondent's employees named Rainey, who was dressed in a straw hat, bermuda shorts and a T-shirt, carried a clip board and a pencil and who was giving orders to other men regarding the throwing of switches and the

making up of trains. Petitioner asked Rainey about a train ride. He replied that a train would probably leave at 3:30 but he was not sure if they could ride on it because he didn't know whether it would contain any empties. He suggested that the boys wait and see. While the boys were waiting, a man introduced himself as Mr. Dopp, and said, "I am your engineer for the first 125 miles." (Deft. App. 22). Rainey told the boys that the train was a fast freight without empty box cars; but it needed 65 cars on it and as it was some short he would put some "mix" on, meaning empties, then they would be able to ride (Deft. App. 22). Rainey told them he could only send the "mix" to Pine Bluff and they could get another ride there. (Deft. App. 23) He showed them the track and the string of cars standing on it and told them to go down and pick out a car. (Deft. App. 22). The boys talked with various other employees about their intended ride and were given various departure times for other freight trains; they remained in the yard a large part of the day, roaming across the tracks, resting on the ice dock, climbing over cars and riding box cars that were being kicked in. When the time came for the 3:30 train to leave, Rainey and engineer Dopp reminded the boys that it was leaving and pointed to where the empty box cars were located. They accordingly walked down the track and got in an empty box car. Before the train pulled out, the rear brakeman came past and seeing the boys in the car, inquired where they were going. They replied that they were going to Texas, whereupon he said "O.K. Keep a watch out and if you see anything wrong, come back and tell me. I will be riding in the caboose". (Plaintiff's App. 23) He also called them to the attention of a car inspector who was inspecting the train.

The railway employees testified that the operating rules of the railroad prohibited non-paying passengers on the engine or the caboose, but that the railroad did not require them to report or remove persons riding in empty box cars. (Deft. App. 64, 73, 79, 80, Plaintiff's App. 30) A brakeman testified that during the 20 years prior to 1963, he had seen some five or six persons per year riding in box cars and had never requested any of them to leave. He had never had anyone instruct him to put anyone off box cars and he did not report them to police or supervisory employees unless they were building a fire to keep warm. (Plaintiff's App. 30)

It was a very hot day and for the purpose of ventilation, and to avoid pieces of lumber which were being jolted around in the car, the boys moved to the doors of the box car and sat with their feet hanging out.

The train stopped at Illmo, Missouri, 125 miles from East St. Louis, and was inspected by the conductor and rear brakeman at that point. The boys were not required to leave and remained on the train.

Another engineer took over and the train started out of Illmo at a much higher rate of speed than it had attained previously. At the time of the accident, the train was passing through a series of curves at a speed which the locomotive tape indicated was 70 miles per hour, which was five miles in excess of Respondent's speed restriction in that area. (Def. App. 99). There were sudden lurches of the cars as the train passed around the curves. The testimony indicated that there was between 22 and 35 feet of slack in the couplers of this train, which inevitably led to excessive lurching and jolting as the train rounded these curves. At Avert, Missouri, there was a girder on a bridge so close to the tracks that if there

was a load in excess of nine feet wide, the railroad usually sent a message to slow down or stop to make sure the train cleared the bridge. No such message was sent for this train. A sudden and extreme lurch, and running out of slack occurred as the train was passing over this bridge, which knocked the Petitioner off balance and caused his legs to be thrown out from the side of the car. He came in contact with the girder and was knocked from the train and suffered the loss of his left leg, with other injuries.

REASONS WHY THE WRIT SHOULD BE GRANTED

THE COURT OF APPEALS IN REVERSING THIS CASE DECIDED A MATERIAL QUESTION OF LAW IN DIRECT CONFLICT WITH THE MOST RECENT DECISIONS OF THE SUPREME COURT OF MISSOURI.

Petitioner was riding the train in question with the knowledge, consent and approval of everyone of the Respondent's employees with whom he came in contact. In fact, they directed him where to ride and gave him instructions as to what to do to continue his journey. In so doing, they were following a custom and practice which had prevailed on the Respondent's railroad for at least 20 years.

Petitioner did not, in fact, steal a ride from Respondent. On the contrary, he walked into the Respondent's yard and asked the man in charge whether he could obtain a ride. The man answered in the affirmative, pointed out the train he could board, and told him he was going to have some empty cars switched in, of which Petitioner might avail himself. He introduced Petitioner to other railroad employees, one of whom asked Petitioner to keep a watch out for anything which might go wrong

on the journey. How and where could Petitioner have obtained consent from any higher source? If the man making up the train told Petitioner he could ride on it, why should he be required to look further? *There was no passenger station where he could apply:* In fact, Respondent maintains no passenger service. Missouri has held in railroad cases that the doctrine of apparent authority is all that is necessary to make an adult, much less a child, a passenger. *Dysort* v. *M. C. & T. Ry. Co.,* 122 F 228, 230 (8th Cir. 1903); *Barry* v. *Mo. Pac. Ry. Co.,* 124 Mo. 223, 25 SW 229 (1894); *Muelhausen* v. *S.L. S. W. Ry. Co.,* 19 Mo. 332, 2 SW 315 (1886).

In *Hall* v. *Missouri P. R. R.,* 118 SW 56(1909), Missouri Supreme Court, the court said, p. 65:

> "A license could only be granted by some authorized act of the defendant *or by acquiescence of defendant for a length of time.*" (Our italics).

In our case, the acquiescence was for a period of at least 20 years.

This is not a case where a child placed himself in an obviously dangerous position never intended for the carriage of freight or passengers, as was true in *Stringer* v. *Mo. Pac. Ry. Co.,* 96 Mo. 299, 9 SW 905 (1888); *McClanahan* v. *S.L.P.S. Co.,* 363 Mo. 500, 251 SW 2d 704 or *Giles* v. *Mo. Pac. Ry. Co.,* 169 Mo. App., 24, 154 SW 852, relied upon by the Court of Appeals in this case.

The Missouri Supreme Court has abandoned the doctrine enunciated in the cases above mentioned, and on which the Court of Appeals relied. In the case of *Porchey* v. *Kelling,* 353 Mo. 1034, 185 SE2d 820 (1945), the court said, p. 823:

". . . A licensee enters for his own purposes, and with the permission, expressed or implied, of the possessor. An entrance made by sufferance, expressed or implied, distinguishes the licensee from the trespasser. . . ."

For a period of 20 years, non-paying passengers had been permitted, by sufferance, both expressed and implied, to ride on Respondent's trains. Now suddenly the Respondent awakens to this notorious custom, and belatedly discovers that its servants had no authority to permit such riders.

The category in which the Petitioner was placed during his journey, if not that of an invitee, since he was directed to watch for trouble while on the trip, was certainly nothing less than a licensee. He boarded the train at the invitation and with the knowledge and consent of the servants of the Respondent. His presence was known to them at all times. They made no attempt to remove him. They were, therefore, bound to exercise toward him the degree of care which Missouri law requires to be exercised towards licensees. That duty, the Supreme and Appellate Courts of Missouri have laid down clearly in many recent cases.

The rule in Missouri, as in most states today, is that the owner of property is liable to a licensee for active negligence, although it is recognized that a licensee cannot recover for passive negligence such as the maintenance of a dangerous structure during the darkness. This doctrine has been recognized in many recent Missouri cases such as *Anderson* v. *Welton*, 334 SW2d 132 (1960), where the court said, p. 136,

"It is now generally held that in cases involving injury resulting from active conduct as distinguished

> from conditions of the premises the landowner or possessor may be liable for failure to exercise ordinary care towards a licensee whose presence on the land is known or should reasonably be known to the owner or possessor."

In the most recent case of *White* v. *Burkeybile,* 386 SW2d 418 (1965), the court said, p. 423,

> "Where injuries to a licensee are caused by the affirmative or active conduct of another, as distinguished from an existing or passive condition of the premises, the person committing the acts is subject to liability for failure to exercise ordinary care towards such licensee if his presence on the land is known or should reasonably be known to the actor."

The conduct of the respondent in hauling its train around a series of curves and close clearance bridges in the instant case while traveling at a speed in excess of its own restrictions, is active negligence by any standard.

The Court of Appeals apparently was influenced in arriving at its decision in this case by the language in some of the decisions which it quotes to the effect that a person who secures a free train ride on a freight train is a law breaker. The Court failed to note, however, that the statute mentioned in these decisions has been amended by Missouri Statute 564.350, so that it is no longer operative against persons riding by permission of the employees of the railroad. Thus, the instant Petitioner's presence on the train was lawful. It is clear, therefore, that Petitioner was not a trespasser nor a law breaker but was a licensee riding with the full knowledge and at the invitation of the railroad's servants.

THE COURT OF APPEALS HAS DECIDED A QUESTION OF LAW IN CONFLICT WITH A DECISION OF THE 8TH CIRCUIT COURT OF APPEALS.

In *Dysort* v. *M. K & T. Ry. Co.*, 122 F. 228, 230 (8th Circuit 1903, a Missouri case) a doctor obtained permission from a local train master to ride a freight train. The train master had apparent authority to extend permission, but no actual authority, which resided in a higher official. The 8th Circuit Court of Appeals held that the railroad was required to exercise toward the doctor the same degree of care as if the train master had secured express authority for him to board the freight train. This doctrine of apparent authority is in line with the weight of the current case law, but is in direct conflict with the decision in the instant case. It is salutary to point out that the average person dealing with a railroad has to accept the ostensible authority of the person with whom he is dealing. If the law were otherwise and every stranger dealing with the railroad had to ascertain the actual authority of the person with whom he is dealing it would place an impossible handicap on the transaction of any business whatever.

THE COURT OF APPEALS INVADED THE PROVINCE OF THE JURY AND UNDERTOOK TO REVIEW THE FACTS, AND TO DECIDE THEM CONTRARY TO THE FINDING OF A JURY.

One of the principal defenses here was that the servants of the Respondent were not acting within the scope of their authority when they invited the Petitioner to ride. This issue was submitted to the jury and they were carefully instructed on it. (Deft. App. 139, 140). The jury's verdict in favor of the Petitioner necessarily implies that they found as a fact that the Respondent's

servants were acting within the scope of their authority, express or implied. They also answered a special interrogatory that the Petitioner was not guilty of contributory negligence (Deft. App. 146).

The Court of Appeals, however, lays great stress on Rule 505 of the Respondent, which prohibits free passengers riding on freight trains *unless properly authorized,* and says, Appendix B, p. 4a:

> "The evidence as to the extent or frequency of the violation of Rule 505 by railroad employees was inconclusive."

In support of this conclusion, the Court quotes as illustrative the testimony of Earl Fiesler, a conductor who was not on the train on which Petitioner was injured, who said no passengers were supposed to ride on trains. (Deft. App. 78, 80).

The Court of Appeals ignores the mass of contradictory testimony. Brakeman Trucks testified that the rules only prohibited him from permitting boys to ride the engine and caboose, that employees were not required either to remove or report boys in empty box cars, that he had seen as many as five or more persons a year riding empty box cars during a twenty year period, that he had never been instructed to remove them. (Deft. App. 63-65).

Rainey, the yard clerk who permitted Petitioner to ride, testified he had seen other hitchhikers riding prior to the accident. (Deft. App. 55, 56, 57).

Conductor Frazier (who was in charge of the train in which Petitioner was riding) testified that he was not required to do anything about unauthorized persons riding trains, and that he wasn't required to remove or report them (Deft. App. 77).

Thus it is apparent that the testimony on this point was contradictory, although overwhelmingly in favor of Petitioner. The jury, which was the fact-finding body, resolved the conflict in favor of the Petitioner. The Court of Appeals, however, upset the jury's finding, saying the evidence was "inconclusive", proceeded to treat the Petitioner as a trespasser, and applied to his case the rules as to trespassers laid down in the turn of the century series of cases cited in its opinion. This testimony may have been "inconclusive" to the Court of Appeals, but not to the jury, to whom it was submitted.

We submit that the Court of Appeals was bound to accept the verdict of the jury, founded on substantial evidence, that the train crew had authority to permit the Petitioner to ride.

It is a fundamental principle of federal jurisprudence that a court of appeals cannot review a jury's determination of a question of fact, and that once an evidentiary basis appears, the upper court's power of review is exhausted. (*Lavender* v. *Kurn*, 327 U.S. 645, 652, 653.

CONCLUSION

For the reason stated, this Petition for Certiorari should be granted.

Respectfully submitted,

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